Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DANI HOURANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the district courts' practice of issuing "blanket" grants or denials of a certificate of appealability under for appeals pursuant to 28 U.S.C. § 2255 — without affording the parties an opportunity to litigate the criteria set forth in 28 U.S.C. § 2253(c)2), and without conducting any individualized assessment of the constitutional issues raised in a petition for habeas corpus — is contrary to Congress's intent in enacting the AEDPA, an abdication of the district courts' responsibility as "gatekeeper" for such appeals, and a violation to petitioner's due process rights?

Whether a disturbing lack of standards or uniformity amongst the courts of appeal on the COA procedure creates an important federal question that should be settled by this Court?

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Friedman, D.J.) denying petitioner's petition for writ of habeas corpus was entered on August 8, 2001 (Pet. App. 4a-16a), and the district court's order denying petitioner's motion for reconsideration and order denying certificate of appealability (Pet. App. 2a-3a) are appended but are not otherwise published. The court of appeals' order denying the petition for certificate of appealability (Pet. App. 1a), and the court of appeals' order denying the petition for rehearing and for rehearing en banc (Pet. App. 17a-18a) are appended but are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered the order which is the subject matter of this petition on January 11, 2002, and denied rehearing and rehearing en banc on April 25, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Fifth Amendment to the United States Constitution (the "Due Process Clause"), and of 28 U.S.C. § 2253(c)(2), relevant to this petition are reprinted in the Appendix. (Pet. App. 19a).

STATEMENT OF THE CASE

Petitioner Dani Hourani was convicted after a jury trial in the Eastern District of Michigan of one count of conspiracy to kill a federal witness, in violation of 18 U.S.C. § 371, and one count of homicide with the intent to prevent another person from testifying in a federal proceeding, in violation of 18 U.S.C. § 1512(a) and 18 U.S.C. § 2. In July 1996, Mr. Hourani was sentenced by the district court to a mandatory term of life imprisonment. His convictions were affirmed by a panel of this Court in January 1999. *United States v. Dani Hourani*, 1999 WL 16472 (6th Cir. (Mich)).

In March, 2000, Mr. Hourani filed a petition pursuant to 28 U.S.C. § 2255, based on multiple violations of his constitutional rights, including *inter alia*, (a) trial counsel's failure to review or present exculpatory evidence contained in a conversation secretly tape-recorded by the government and (b) trial counsel's failure to investigate or challenge the jury selection procedures in the Eastern District of Michigan as requested by the petitioner. On August 8, 2001, the district court denied Mr. Hourani's § 2255 petition in a written opinion and order. On October 5, 2001 the district court denied Mr. Hourani's motion for reconsideration and, *sua sponte*, refused to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) before the petitioner had an opportunity to request one.

On January 11, 2002, the court of appeals denied the petitioner's appellant's motion for a COA.

REASONS FOR GRANTING THE WRIT

I. The Practice Of Issuing "Blanket" Grants Or Denials Of A Certificate Of Appealability Under 28 U.S.C. § 2253(c)(2) — Without Affording The Parties An Opportunity To Litigate The Issue Of A "Substantial Showing Of The Denial Of A Constitutional Right" And Without Any Individualized Assessment By The District Courts Of The Issues Raised In A Petition For Habeas Corpus — Is Contrary To The Congress's Intent In Enacting This Provision Of The AEDPA, Is An Abdication Of The District Courts' Responsibility As "Gatekeeper" For Such Appeals, And Is A Violation Of Petitioner's Due Process Rights.

A. Introduction

Petitioner Dani Hourani raised a single issue of ineffective assistance of counsel during his direct appeal — that trial counsel failed to move for a directed verdict under Rule 29. In petitioner's brief on appeal, appellate counsel expressly reserved the right to raise additional claims of ineffective assistance on a § 2255 petition, if necessary, in the event the court of appeals denied his direct appeal. The additional claims of ineffectiveness all would have required further evidentiary support which could only be developed in a collateral proceeding in the district court under § 2255. However, when the petitioner returned to the district court with these claims following his direct appeal, the district judge ruled that litigation of petitioner's ineffective assistance claims were procedurally barred in a gross misapplication of the doctrine of collateral estoppel. The record that was developed (in pleadings filed by the petitioner) demonstrated clearly that trial counsel had provided ineffective assistance of counsel. Significantly, trial counsel conceded his omissions in an affidavit filed in the district court in connection with the § 2255 petition.

Thereafter, in its order denying the motion for reconsideration of the § 2255 petition, the district court, *sua sponte*, denied the motion for reconsideration *and* the certificate of appealability (COA), depriving petitioner of any opportunity to litigate whether he had made a "substantial showing of a constitution violation" under § 2252(c)(2) — an absolute prerequisite to appeal. The court of appeals repeated the error in this case, rejecting the COA in a one-sentence "blanket denial", even though this same court of appeals had recently outlawed such orders in a series of published opinions.

The end result is that the petitioner has been deprived of any opportunity to appeal his Sixth Amendment claims of ineffective assistance of counsel, either on direct appeal or in collateral proceedings pursuant to 28 U.S.C. § 2255.

B. The requirements for the issuance of a COA under § 2253(c)(2)

A certificate of appealability is a prerequisite to an appeal from a district court's denial of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. The Antiterrorism and Effective Death Penalty Act of 1996, § 102, 28 U.S.C. § 2253 (Supp. II 1997) ("AEDPA"), both renamed the certificate needed to appeal the denial or dismissal of a § 2255 petition and changed the standard for issuing that certificate. Prior to the AEDPA, petitioners wanting to appeal had to seek a certificate of probable cause (CPC), which required making a "substantial showing of the denial of [a] *federal* right." *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090 (1983) (emphasis supplied). By contrast, with the advent of the AEDPA, federal courts may grant COAs "only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis supplied).

> Stated fully, that standard requires an appealing petitioner to " 'demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further." ' "

Henry v. *Department of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999), quoting from *Barefoot*, 463 U.S. at 893 n.4, 103 S. Ct. at 3394 n.4 (alteration in original, additional citations omitted). Courts have since characterized this as a "modest standard" for petitioners. *Whelchel v. Washington*, 232 F.3d 1197, 1202 (9th Cir. 2000).

Interpreting § 2253(c)(2), this Court in *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), required lower courts to conduct a reasoned assessment of each claim presented in a petition for COA by the § 2255 petitioner. In the wake of this Court's decision in *Slack*, many of the circuit courts of appeal have held that the blanket grant or denial of a COA by the district court or courts of appeal may be a violation of § 2253(c)(2) as that provision was interpreted in *Slack*. *See Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (reversal and remand due to a blanket denial of COA); *LaFevers v. Gibson*, 182 F.3d 705, 710 (10th Cir. 1999) (cautioning against the blanket denial); *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996) (en banc) (blanket grant of COA was an abdication of the district court's statutorily mandated responsibility to determine which claims worthy of appellate review, remand ordered). *See also Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001); *United States v. Weaver*, 195 F.3d 52, 53 (D.C. Cir. 1999); *Muniz v. Johnson*, 114 F.3d 43, 45-46 (5th Cir. 1997); and *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001). Contrast *Szuchon v. Lehman*, 273 F.3d 299, 311-312 (3d Cir. 2001) (inadequate COA viewed as a "nullity").

In *Porterfield*, 258 F.3d at 486, the Sixth Circuit explained as follows:

> Since the enactment of AEDPA, this court has noted a disturbing lack of uniformity throughout the districts of our circuit with respect to how trial courts are to determine the extent to which certificates of appealability should issue. The approaches vary from a blanket grant as to all issues, as in this case, to blanket denials. Both of these approaches undermine the gatekeeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims which have little or no viability. Moreover, because the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than this court to determine which claims should be certified.

Porterfield, 258 F.3d at 486.

In *Murphy*, the Sixth Circuit reversed where "the local court denied Murphy a COA before Murphy had even applied for one, and failed to provide any analysis whatsoever as to whether Murphy had made a 'substantial showing of the denial of a constitutional right.' " *Id.* In *LaFevers*, the court of appeals observed, "it is equally important . . . that district courts do not proceed to the other end of the jurisdictional spectrum and make a blanket denial of a certificate of appealability unless the court is convinced there is nothing in the petition that is of debatable constitutional magnitude." *Id.* 182 F.3d at 710.

Following its *Porterfield* decision, the Sixth Circuit was routinely remanding cases back to the district court in cases involving the blanket grants or denials of the COA [*see, e.g., Murphy, supra*], but then abruptly reversed itself without explanation in petitioner's case. The practice of issuing the *sua sponte* "blanket denial" has now surfaced again on a number of occasions in the petitioner's district and elsewhere. *See, e.g., Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000); *Dell v. Straub*, 194 F. Supp. 2d 629 (E.D. Mich. 2002); *Kasi v. Angelone*, 2002 WL 416670 (E.D. Va.); *Herron v. Smith*, 2001 WL 902621 (E.D. Mich.).

C. The blanket grant or denial of the COA subverts Congress's intent in enacting the AEDPA

As noted above, the AEDPA substituted the COA for the certificate of probable cause (CPC). For purposes of the instant petition, the most significant distinction between the CPC and the COA is that in the former CPC, the district court did not have to enumerate those issues for which a petitioner had made "a substantial showing of a denial [a] federal right." *Barefoot*, 463 U.S. at 893, 103 S. Ct. at 3394. *Peoples v. Haley*, 227 F.3d 1342, 1344 (11th Cir. 2000); 28 U.S.C. §§ 2253(c)(2) & (3). By issuing a *sua sponte* blanket denial of all petitioner's issues in the same opinion and order which denies the § 2255, the district court has ignored Congress's intent under the AEDPA to act as "gatekeeper" for screening issues worthy of appeal. *LaFevers*, 182 F.3d at 710 (requiring compliance with COA requirements in capital cases because "it is in those very cases in which the deft scrutiny of the district court is most essential to the appellate process."). The contemporaneous order denying both the habeas petition and the COA deprives the parties of the opportunity to litigate the presence of a meritorious constitutional question. The district court cannot possibly be conducting the mandated "reasoned", "individualized" assessment as to whether the issues should be aired in an appeal because the contemporaneous *sua sponte* order precludes advocacy of any kind.

D. The blanket denial was a deprivation of due process

The petitioner maintains further that the arbitrariness of the "blanket denial" of his request for a COA, and the failure of courts to provide an individualized analysis of each claim, any rational basis for the decision or any statement of reasons for the denial, violated his right to due process. This Court has stated that "[t]he touchstone of Due Process is freedom from arbitrary governmental action". *Ponte v. Real*, 471 U.S. 491, 495, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985). Consequently, in a variety of contexts, federal courts have held that where courts act in an "arbitrary and capricious" manner in enforcing procedural rules, or where they simply do not enforce their own rules at all, due process is violated. *Hunterson v. DiSabato*, 137 F. Supp. 529, 543 (D. N.J. 1999); *Gilbert v. Sowders*, 646 F.2d 1146 (6th Cir. 1981); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 901 (9th Cir. 1988); *Brown v. Wilmot*, 572 F.2d 404 (2d Cir. 1978); *Walker v. Deeds*, 50 F.3d 670 (9th Cir. 1995).

A "statement of reasons" for decisions made by state or federal authorities has been held to be a fundamental requirement of due process. *Wolff v. McDonnell*, 418 U.S. 539, 563-67, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); *Rizvi v. Crabtree*, 42 F. Supp. 2d 1024, 1026 (D. Ore. 1999); *Hester v. McBride*, 968 F. Supp. 765, 772 (N.D. Ind. 1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *United States v. Sanchez*, 30 F. Supp. 2d 595, 597 (E.D.N.Y. 1998); *Quartararo v. Hoy et al.*, 113 F. Supp. 2d 405 (E.D.N.Y. 2000); *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045, 1054 (1966).

The *sua sponte* denial of the COA by the district court was an "arbitrary and capricious" action which deprived the petitioner of due process.

E. Standards for evaluating a procedural ruling contained in COA

By extending the reach of § 2253(c)(2) to procedural rulings, this Court made clear in *Slack* that the district courts should not be self-screening their own errors in procedural rulings *without further appellate review*. *Id.*, 529 U.S. 473 at 483, 120 S. Ct. 1595.

> Denying COAs for procedural dismissals "would preclude appellate review of all procedural issues relating to federal habeas corpus. The district courts would be left to themselves to develop the law relating to AEDPA's statute of limitations, the exhaustion requirement, etc., potentially leading to unreviewable contradictions in the law of the circuit or the erroneous denial of relief to a petitioner under a sentence of death."

Henry v. Dept. of Corrections, 197 F.3d 1361, 1365-1366, (11th Cir. 1999), quoting from *Morris v. Horn*, 187 F.3d 333, 340 (3d Cir. 1999), and legislative history of AEDPA, S. Rep. No 104-179 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924; H.R. Conf. Rep. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944.

Consequently, when a district court rejects a § 2255 petition on a procedural ground, § 2253(c)(2) then requires the district court initially, and the court of appeals thereafter, to determine if jurists of reason would find it debatable whether the district court was correct in its procedural ruling, if another court might resolve the issue differently, or if the

issues are suitable enough to deserve encouragement to proceed further. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *See also Beck v. Angelone*, 261 F.3d 377 (4th Cir. 2001), discussing *Slack, supra*.

Had either court adhered to this requirement, it would have been readily apparent that Mr. Hourani's petition had met the COA's prima facie showing for the appeal of a procedural question. Not only was the district court's collateral estoppel ruling "debatable among jurists of reason", it was clearly wrong.

F. Collateral estoppel does not apply as a procedural bar to Petitioner's ineffective assistance of counsel claims

On the direct appeal of his conviction, the petitioner's appellate counsel raised a single-pronged ineffective assistance of counsel challenge: that if the Court of Appeals were to find the evidence at trial to be insufficient under Federal Rule of Criminal Procedure 29, *and* if the Court were also to find that the issue had been waived by virtue of trial counsel's failure to raise a Rule 29 motion, then, and only then, was Mr. Hourani asserting ineffective assistance of counsel. Appellate counsel expressly reserved the right to raise other ineffective assistance of counsel challenges in a proceeding under § 2255 if that proved necessary. During the petitioner's direct appeal, the court of appeals did not find the evidence insufficient under Rule 29, and consequently that particular ineffective assistance of counsel claim was rendered moot.

Thereafter, Mr. Hourani proceeded with his § 2255 petition, raising a number of completely distinct ineffectiveness claims, including *inter alia* (a) counsel's failure to review or present exculpatory evidence contained in a conversation secretly tape-recorded by the government [*see* § G(1) *infra*] and (b) trial counsel's failure to investigate or challenge the jury selection procedures in the Eastern District of Michigan as requested by Mr. Hourani [*see* G(2) *infra*].

In denying *all* of petitioner's ineffective assistance claims, the district court applied the doctrine of "collateral estoppel", finding that Mr. Hourani was barred from raising an ineffectiveness challenge on his petition pursuant to § 2255 because Mr. Hourani had raised *an* ineffectiveness challenge previously on direct review. Without differentiating between ineffectiveness claims (and without citing a single § 2255 case to support the ruling), the district court proclaimed: "Defendant may assert an ineffective assistance claim either on direct appeal or in a § 2255 motion, but not both." Opinion and Order Denying § 2255 Motion, p. 3 (Pet. App. 7a).

At the outset, as a factual matter, it is difficult to fathom how raising ineffectiveness on one ground could ever trigger the collateral estoppel doctrine as to an ineffectiveness challenge on a completely separate ground. For example, in *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001), the court of appeals recognized that ineffectiveness claims made on different bases are themselves separate claims. Consequently, Mr. Weinberger's ineffectiveness challenge based upon counsel's performance at the defendant's sentence was held to be distinct from an even narrower ineffectiveness challenge to counsel's performance based upon a distinct sentencing restitution claim. Based upon the logic of that decision, it seems obvious that an ineffectiveness challenge based upon trial counsel's failure to raise a Rule 29 motion is distinct from an ineffectiveness challenge based upon trial counsel's failure to preserve a challenge grounded in racial discrimination during jury selection.

Setting aside that conundrum, the district court's decision to bar review of this claim in a § 2255 proceeding is in direct conflict with numerous published decisions from the courts of appeal. In fact, the Sixth Circuit's own routine method of

handling the ineffectiveness challenges made for the first time on appeal is to direct defendant-appellants back to district court through the § 2255 procedures. For example, in *United States v. Brown*, 276 F.3d 211, 217 (6th Cir. 2002), the court of appeals observed as follows:

> We do not address on direct appeal claims of ineffective assistance unless the record has been sufficiently developed to provide meaningful factual review. See *United States v. Aguwa*, 123 F.3d 418, 423 (6th Cir. 1997). . . . In this case we have no evidence to evaluate counsel's performance at trial. . . . Accordingly, we will defer review of these claims to a post conviction proceeding where the record may be fully developed.

Brown, 276 F.3d at 217. Similarly, in *Aguwa*, the court observed,

> [o]ur court has routinely concluded that such claims are best brought by a defendant in a post conviction proceeding under 28 U.S.C. § 2255 so that the parties can develop an adequate record on the issue.

Aguwa, 123 F.3d at 423.

The law in other circuits is consistent with the holdings of *Aguwa* and *Brown*. For example, in *United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994), the Ninth Circuit reiterated that:

> [T]he customary procedure in this circuit for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255. . . . This

> court usually declines to reach ineffectiveness challenges on direct appeal, because the claim cannot be advanced without development of facts outside the record.

The Court went on to hold in *Hanoum* that if a § 2255 petition is filed thereafter, "*it should not be barred by collateral estoppel or other procedural bars.*" *Hanoum*, 33 F.3d at 1131.

Consequently, the district court's ruling that the petitioner was collaterally estopped from raising his alternative ineffectiveness claims is both legally and factually incorrect. By applying collateral estoppel to all of the petitioner's ineffectiveness claims in the § 2255 proceeding, and by forbidding such claims (based upon an inadequate record) on direct appeal, Mr. Hourani has been completely foreclosed from any avenue of review for these claims. Accordingly, the district court's ruling meets the *Slack* standard for the issuance of a COA based upon a procedural ruling because the question is at least "debatable among jurists of reason".

G. Petitioner's ineffective assistance of counsel claims are meritorious

The COA should have been granted in this case further because the petitioner should prevail on the merits. Petitioner presented a multi-faceted claim of ineffective assistance of counsel that should have been screened by the district court for a "substantial showing of a denial of a constitutional right" under § 2253(c)(2). Petitioner will address two aspects of his ineffectiveness claim, albeit very briefly, to demonstrate that the district court abdicated completely its gatekeeping function by barring these claims on the merits.

1. Trial counsel's failure to investigate and to present defense evidence

Counsel's failure to investigate and prepare this case adequately for trial resulted in the loss of evidence that would have exonerated the petitioner and would have demonstrated his innocence. For example, the government accused petitioner of (a) participating in a plan to murder a witness in his upcoming drug trial, and (b) murdering a second person by accident when the plan was executed. *Before* the killing in this case, the petitioner was secretly tape-recorded by the government talking to a person who would become the "star" witness in the federal case involved here, Abbas Aldirani. The government never introduced this tape at trial, no doubt, because it was completely exculpatory to petitioner. Defense counsel, inexplicably, never had it transcribed for review by the defense or for use at trial. A transcript of the conversation produced after trial reveals that it is informant-witness Aldirani who initiates the idea of eliminating a witness in the drug case, Hassan Cheaib, and using a black male from the "Legends" bar to do it. In response, Petitioner Hourani questions why they would want to do anything to Cheaib. It is apparent that Hourani does not know who the "Legends" bar black person is, that he wants no part of Aldirani's plan, and that he actively dissuades Aldirani from even thinking about this plan, calling it "stupid" and "crazy".

These excerpts in the tape start with Aldirani talking about how Aldirani "can find out where that bastard is", in reference to Hassan Cheaib. There is no affirmation of any kind by Petitioner Hourani. Exhibit D appended to Petition for Rehearing, Tr. pp. 32. A few minutes later, unsolicited, Aldirani again brings up the subject of Cheaib being seen at the local airport and Hourani responds, "What do you want with him?" Aldirani's response,

> ALDIRANI: If we can finish with this, let us finish, right or no? Let us finish this problem here. At that

> time, you can call your friend, tell him. Right or wrong? Once we finish from this, then you won't have anything on you. Right or wrong? Yeah.
>
> PETITIONER HOURANI: I don't give a fuck. [Cheaib] can't do nothing to me. He can't do nothing to me . . . I never talked to the guy. . . . How's he going to hurt you? I don't give a fuck about him, and my dad he can't do shit about him anyway.

Id. p. 38. A few minutes later in this conversation, Aldirani again raises the subject of Cheaib.

> ALDIRANI: I'm arranging him a problem like nothing else, I'm arranging him a problem.
>
> PETITIONER HOURANI: For who?
>
> ALDIRANI: For that bastard, that brother of a bitch, I'm arranging him a problem like nothing else.
>
> . . . .
>
> ALDIRANI: I told you, fuck, I'm gonna arrange something you'll like. I'm gonna, this week or next week. . . .
>
> PETITIONER HOURANI: What do you want with him[?] [H]e can't hurt you. Let him go downtown, who cares . . . Who gives a fuck what he can do . . .

When Aldirani still persists, it is Hourani who stops him: "That's it! It don't matter to me." When Aldirani again returns

to the issue of eliminating Cheaib for the *sixth* time, suggesting that he wants to "blow up" Cheaib, he asks Hourani whether Hourani can contact "that nigger, your friend". Hourani's responses demonstrate that he doesn't know who Alderani is referring to, nor is he at all interested in this nonsense.

> PETITIONER HOURANI: Who?
>
> PETITIONER HOURANI: That's it, you need to forget these things . . . This is crazy. That's all you think about. It's just stupid . . . It's not a game . . . You can't do stuff like that, that's it. Go to jail, do your time, come back, that's it. But don't do anything, see what I'm telling you. There's nothing we can do . . . just sit here and wait and what happens happens . . .
>
> PETITIONER HOURANI: Don't think about it, I'm telling you don't think about that. [T]hat's not me, you know, what do I want with him[?] Something like that and you'll really be fucked. Who gives a fuck. Sit here. . . . I'm not involved with him. I don't care, I'm gonna sit here in jail . . . . If I have to get five years, I'll do five years. I'll just have to learn my lesson.

Id., pp 38-40, 44-45, 51, 54-55. From these excerpts of the government's own secret recording of this conversation, it is apparent that Petitioner Hourani had absolutely no interest in being involved in a plan to attack Witness Cheaib. He goes so far as to try and persuade Aldirani to give up any such ideas. This evidence goes far beyond mere "impeachment" of Aldirani. It would have shown that Petitioner Hourani had no motive and no predisposition to attack or kill Cheaib. If anything, it shows that Hourani does

not believe that Cheaib is really even a witness against Hourani, that it is Aldirani that is concerned about Cheaib's potential testimony against Aldirani, and that it is Aldirani who is obsessed with the idea of killing Cheaib.

This tape is outcome-determinative when one considers that Aldirani eventually became the star witness, and Hourani the defendant.[1]

Moreover, the district court's characterization of this evidence as "impeachment" material is simply wrong. This tape-recorded evidence embraced the petitioner's defense theory completely. The government acknowledged that Aldirani was the head of a heroin distribution organization in Detroit. Aldirani was notorious for his double dealing — acting as an informant for the government while continuing unabated his heroin organization. The defense maintained that it was Aldirani, not petitioner, that eventually did secure the services of the very same African-American "hit" man from the Legends bar suggested by Aldirani on the tape. In the tape, it is Aldirani who is repeatedly suggesting using this person, and ultimately it was a person who fit this Legends-bar-black person's description who carried out the murder plot, intending to kill Cheaib, but executing another person instead. Contrary to the government's theory, this was Aldirani's conspiracy, not petitioner's.

In addition, defense counsel also failed to interview a crucial witness, Hrak Akyan, who gave exculpatory testimony

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1. The loss of this evidence was especially prejudicial to petitioner, because the government argued in closing that the tape was the "key" to the case against him. The government also advised jurors that the tape recording wasn't being introduced because it was inaudible. As the transcript exhibit demonstrates, this statement was clearly untrue. (Closing Argument, Trial Tr 8/17/95, 176).

before the grand jury, and who eventually made other statements that Aldirani told him that Aldirani intended to falsely blame Dani Hourani of this crime in order to get leniency for himself. *See* Fishman Affidavit ¶ 2, appended as Exhibit E to Petition for Rehearing. Again, this was not merely "impeachment" evidence. It embraced the essence of the petitioner's defense theory — that it was Witness Aldirani, not petitioner, who ordered the execution of the intended target, Cheaib.

2. Failure to raise pretrial challenge to racial discrimination in selection of petit jury under *United States v. Ovalle*, 136 F.3d 1092, 1105-1107 (6th Cir. 1998)

a) Petitioner's preservation of the error

In connection with the § 2255 petition, trial counsel, Mr. Steven Fishman, presented his sworn affidavit acknowledging all of the facts material to this claim. Moreover, Petitioner Hourani's claim is not only supported by a candid admission of ineffectiveness by Mr. Fishman, but in addition, both Hourani and Fishman's claims are corroborated by secret government-orchestrated tape-recordings. In addition, this claim is supported by a copy Mr. Fishman's handwritten notes, taken during a jailhouse meeting with Hourani. All of this material was presented to the district court in proceedings below, and all of this material is a part of the record.[2] Rarely will this Court see a more

2. Two sworn affidavits from trial counsel Fishman, Fishman's notes from an attorney-client meeting with the petitioner, and the transcript of the Aldirani-Hourani monitored conversation were made a part of the record in the district court attached to Petitioner's Motion to Reconsider the Denial of the § 2255 Petition. Attorney Fishman's Affidavit dated September 5, 2001 is appended to this petition. (Pet. App. 20a-23a).

well-documented, uncontroverted claim of ineffective assistance of counsel regarding a constitutionally-based claim.

Long before the trial in this case, Petitioner Hourani was secretly recorded in a series of conversations with Witness Aldirani. During these tape-recorded conversations, Mr. Hourani expressed concern about the composition of juries in the Eastern District of Michigan. During the same time period, Mr. Hourani expressed to Attorney Fishman a fear that minorities, including Arab-Americans like Mr. Hourani, "were being discriminated against in the jury selection process" and that prospective Arab-American jurors were being affirmatively removed from the jury pool on the basis of their race. He asked Fishman to research the local jury system, and he asked Fishman to file an *Ovalle*-type motion to inspect the list of jurors from which the grand jury was selected. *See* Fishman Affidavit, ¶¶ 7-10 (Pet. App. 21a-22a). Attorney Fishman's own personal handwritten notes of his jail conversation with Mr. Hourani were preserved and were presented to the district to corroborate the conversation. Mr. Fishman acknowledges in his sworn affidavit that he made a note of Mr. Hourani's *Ovalle* request, that he was on notice of all of the above, and yet he did absolutely nothing in the way of researching or reviewing the local jury selection procedures in effect at that time, and he failed to file the appropriate motion. Fishman acknowledges that his failure to raise this challenge was not based upon "strategy". *Id.* ¶¶ 8-12 (Pet. App. 21a-22a).

The jury selection system in the Eastern District of Michigan was later held by the court of appeals to be unfair and racially discriminatory because it removed non-black jurors from the jury pool simply because of their racial status in order to increase the percentage of African Americans in the jury pool. *Ovalle*, 136 F.3d at 1105-1107. The Jury

Selection Plan permitted the district to remove every fifth non-black juror from the jury wheel in order to increase the number of black jurors assigned to jury panels in violation of the Fifth Amendment and the Jury Selection and Service Act, 28 U.S.C. §§ 861, *et seq*. Petitioner is a member of the aggrieved class under the *Ovalle* case because he an Arab American, not an African-American. By removing every fifth non-black juror from the selection wheel, the Jury Selection Plan necessarily reduced the number of potential Arab-Americans available for selection. Conversely, a proper selection procedure post-*Ovalle* would have increased the likelihood that an Arab-American would be on petitioner's jury because it necessarily increased the ranks of all non-African Americans. Had defense counsel honored the petitioner's request, his case would have been dismissed on *Ovalle* grounds.

Consequently, the failure to file an *Ovalle* motion deprived the petitioner of a substantial defense, the applicable standard under *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, racial discrimination in jury selection is a "structural" error which is not subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 35 (1999). Structural errors are defects that "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 8.

Petitioner's case is distinguishable from those litigants who make no effort to raise this issue timely. *See, e.g., United States v. Goode*, 110 F. Supp. 2d 580, 581 (E.D. Mich. 2000) (*Ovalle* decision followed defendant's trial, motion filed post-trial); and *United States v. Blair*, 214 F.3d 690 (6th Cir. 2000). In the *Blair* case, the court of appeals found a waiver because the petitioner himself had failed to make any effort to avail himself of the challenge. *Id.* 699. In contrast, it is completely undisputed that Petitioner Hourani personally researched this

issue and raised it with his counsel during the pretrial stages of his criminal proceedings, and consequently this Court should find that there is no procedural default. Counsel acknowledged in proceedings below that petitioner affirmatively requested a motion on this basis even *before* the *Ovalle* decision was rendered, and counsel failed to take any action.

b) District court and court of appeals ruling was based upon a misapprehension of material fact (*Ovalle*)

The district court in this case was under a fundamental and material misunderstanding as to the facts underlying the *Ovalle*-based ineffectiveness challenge in this case. Apparently confused, petitioner's prior counsel in the § 2255 proceedings, Mr. Richard Mazer, wrote in a brief to the district court that the petitioner did not want African-American jurors to be seated in his venire. *See* Defendant Hourani's Supplemental Reply Memorandum, filed July 18, 2000, page 2. The evidence is now uncontroverted that this was a completely inaccurate statement. In fact, Mr. Hourani advised Mr. Fishman that he *wanted* minority jurors, both Arab Americans *and* African Americans, to be seated on his jury, "because he believed that they were fairer and more liberal than white jurors." *See* Attorney Fishman Affidavit, ¶ 11 (Pet. App. 22a).[3] The government was able to use this mistake to its ultimate advantage in the closing stages of the § 2255 proceedings. Because Mr. Mazer had conceded falsely that the petitioner tried to exclude blacks from his jury, the government was therefore able to argue to the district court, perhaps unwittingly but falsely, that the petitioner should not be allowed to raise this *Ovalle* challenge because he comes to the court with "unclean hands." *See* Government's

3. Mr. Hourani's jury was eventually made up of all white, non-minority persons.

Response to Petition Pursuant to § 2255, pp 8-9 . In fact, the petitioner never wanted blacks excluded from his jury, and he made his wishes known to Mr. Fishman.

This misstated fact, that Mr. Hourani did not want black jurors seated, was material to the district court's decision. The district court quoted verbatim from Mr. Mazer's Supplemental Reply Memorandum: that the defendant wanted "African Americans . . . kept off the grand and petit juries". *See* Order Denying Petition Pursuant to § 2255 (Pet. App. 13a).[4] Unfortunately, the misstatement concerning the *Ovalle*-based ineffectiveness challenge persisted into the court of appeals. Mr. Mazer initially represented the petitioner in the appeal of the § 2255 case to the court of appeals. This misstated fact (that petitioner wanted blacks excluded) was never corrected either for the district court or for the court of appeals prior to their decision in this case.

Finally, petitioner's disagreement with his attorney (Mr. Hourani wanted black venire persons, while his attorney deliberately challenged the — *see* Affidavit, ¶ 11, Pet. App. 22a) is not inconsistent with the challenge raised here. Petitioner's primary concern was to avoid having members of his race and culture, Arab Americans, discriminated against in the jury selection process in violation of the Fifth Amendment. Amongst the pool that remained after the unconstitutional selection process, Mr. Hourani preferred minority to non-minority jurors. His preference for Arab American jurors, minority jurors, and non-minority jurors — *in that order* — does not constitute a waiver of this claim. Contrast *United States v. Spearman*, 186 F.3d 743, 748-754 (6th Cir. 1998) (Ovalle challenge by a black person is inapt

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4. Ironically, in a recent opinion, Judge Friedman himself recognized that "racial hostility" is not only directed at African Americans. It also is directed at Arab Americans. *Grutter v. Bollinger, University of Michigan Regents*, 137 F. Supp. 2d 821, 866 (2001).

because the pre-*Ovalle* jury selection procedure actually benefitted black persons).[5]

CONCLUSION

Petitioner Dani Hourani is serving a sentence of life without parole for the underlying convictions in this case. Many courts of appeal have observed that the severity of sentence can and should bear on the question of whether a certificate of appealability should issue. Where the penalty is extreme, any doubts as to whether a COA should issue must be resolved in a petitioner's favor. *Hernandez v. Johnson*, 213 F.3d 243 (5th Cir. 2000); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). "[I]t is in those very cases in which the deft scrutiny of the district court is most essential to the appellate process." *LaFevers*, 182 F.3d at 710. With the advent of the AEDPA, the certificate of appealability process was never intended by Congress to be an outright bar to meritorious constitutional claims brought to the courts of appeal. In this case, unfortunately, the district court has effectively denied Mr. Hourani any and all avenue for the appeal of his meritorious constitutional claims.

With such a disturbing lack of uniformity and basic working standards for the proper consideration of a petition for certificate of appealability under § 2253(c)(2) in both the district and circuit courts of appeal, consideration by this Court is necessary to settle an important question of federal law. Accordingly, petitioner prays that his petition for certiorari be granted.

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5. Defense counsel's deliberate exclusion of African Americans from the jury, contrary to petitioner's wishes, is also a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). This violation prejudiced Mr. Hourani, an Arab American, who was ultimately tried, against his wishes, by an all-white jury, a jury without any racial minority representation whatsoever. Ironically the government also argued in proceedings below that Mr. Fishman's striking of black jurors violated *Batson*. *See* Government's Response to § 2255 Petition, pp. 8-9. Mr. Hourani agrees.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING CERTIFICATE OF APPEALABILITY FILED JANUARY 11, 2002

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 01-2433

DANI HOURANI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MARTIN, Chief Judge.

Dani Hourani appeals a district court judgment denying his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. Hourani applies for a certificate of appealability pursuant to Fed. R. App. P. 22(b).

Upon review, the court hereby denies the application because Hourani failed to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING MOTION FOR RECONSIDERATION AND DENYING CERTIFICATE OF APPEALABILITY DATED OCTOBER 5, 2001 AND FILED OCTOBER 9, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action No.
95-CR-80071-DT-02

Civil Action No.
00-CV-71232-DT

HON. BERNARD A. FRIEDMAN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANI HOURANI,

Defendant.

Appendix B

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION and ORDER DENYING CERTIFICATE OF APPEALABILITY

In an opinion and order dated August 8, 2001, the court denied defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Defendant has moved for reconsideration. Defendant has failed to show a "palpable defect" in the court's order, as required by E.D. Mich. LR 7.1(g)(3). The court stands by its August 8 order, and the motion for reconsideration is denied. Further, as defendant has failed to make "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), the court shall not issue a certificate of appealability in this case.

SO ORDERED.

s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: OCT 05 2001
Detroit, Michigan

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING MOTION UNDER 28 U.S.C. § 2255 AND DENYING DEFENDANT'S MOTION FOR LEAVE TO INITIATE DISCOVERY DATED AUGUST 8, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action No.
95-CR-80071-DT-02

Civil Action No.
00-CV-71232-DT

HON. BERNARD A. FRIEDMAN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANI HOURANI,

Defendant.

Appendix C

OPINION AND ORDER DENYING DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255 AND DENYING DEFENDANT'S MOTION FOR LEAVE TO INITIATE DISCOVERY

This matter is presently before the court on defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence; and on defendant's motion for leave to initiate discovery. Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the court shall decide both motions without a hearing.

In March 1995 defendant was named in a multi-count, mufti-defendant indictment and charged with having conspired to kill a federal witness, in violation of 18 U.S.C. §§ 371 and 1512, and with aiding and abetting the killing of another person with intent to prevent communication of information to law enforcement and prevent attendance and testimony at an official proceeding, in violation of 18 U.S.C. § 1512(a). Defendant was convicted by a jury of both counts. In July 1996 the court sentenced defendant to a mandatory term of life imprisonment, as required by statute and by the sentencing guidelines. In January 1999 the court of appeals rejected all of defendant's arguments and affirmed his conviction and sentence. *United States v. Hourani*, 1999 WL 16472 (6th Cir. Jan. 8, 1999).

The evidence at trial showed that defendant Dani Hourani participated in a conspiracy to kill Hassan Cheaib, who was a confidential informant assisting the FBI in its investigation of a heroin distribution ring. The conspirators arranged to have a "hit man" shoot Cheaib in front of his house.

Appendix C

On December 2, 1992, the hit man shot at, but missed Cheaib; however, the hit man shot and killed Cheaib's companion, Mohamed Biri. The evidence also showed that defendant Dani Hourani was a member of the heroin distribution ring, and that he distributed heroin received from Abbas Aldirani.

In his § 2255 motion, defendant argues that he received ineffective assistance of counsel, that the government withheld exculpatory evidence, and that the government allowed one of its witnesses to commit perjury. The court has carefully reviewed all of the briefs and other documents submitted by defendant and finds no merit whatsoever to any of these arguments.

Initially, the court notes that defendant's current counsel, Richard Mazer, also served as defendant's counsel during the direct appeal. *See* Defendant's § 2255 Motion, p. 19. One of the arguments made by Mr. Mazer in the direct appeal was that defendant's trial counsel, Steven Fishman, "rendered ineffective assistance of counsel by not moving for judgment of acquittal based on insufficient evidence. . . ." *United States v. Hourani*, 1999 WL 16472, at *4. While ineffective assistance claims ordinarily are first raised in a collateral attack on the judgment or the sentence, and not on direct appeal, *see United States v. Wunder*, 919 F.2d 34, 37 (6th Cir. 1990), in the present case defendant elected to raise this claim on direct appeal. The court of appeals considered and rejected the ineffective assistance claim. *See United States v. Hourani*, 1999 WL 16472, at *4.

"Under the doctrine of collateral estoppel, which is also referred to as issue preclusion, once an issue is actually and

necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. The doctrine reflects the longstanding policy that one full opportunity to litigate an issue is sufficient." *Hammer v. Immigration and Naturalization Serv.*, 195 F.3d 836, 840 (6th Cir. 1999) (citations and internal quotation marks omitted). The Sixth Circuit has specifically held that "a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999).

It would appear that defendant is collaterally estopped from relitigating the claim that his trial counsel rendered ineffective assistance. While defendant now offers additional reasons in support of this claim, the claim itself is the same now as it was on direct appeal. Defendant may assert an ineffective assistance claim either on direct appeal or in a § 2255 motion, but not both.

Even if defendant's ineffective assistance claim were not barred by the doctrine of collateral estoppel, the court would reject the claim on the merits. "Inadequate representation by counsel is a ground for relief only if the deficiencies of counsel were so serious that defendant did not have 'effective assistance of counsel' in the constitutional sense." 3 C. Wright & A. Miller, *Federal Practice and Procedure* § 594 (1982). In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test for deciding

whether to reverse a conviction based on a claim of ineffective assistance of counsel at trial or sentencing:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. The Court further stated that "the proper standard for attorney performance is that of 'reasonably effective assistance." *Id.* That is, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The test is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* Further,

> [j]udicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance

> in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689. *See also United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("the threshold issue is not whether [defendant's attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory").

Defendant argues that his attorney was ineffective because he failed to (1) conduct an investigation into the background of one of the government's witnesses, (2) challenge the court's jury selection procedures, and (3) have an audio-taped conversation between defendant and one of the government's witnesses translated and transcribed. As to all three of these arguments, defendant has failed to show either that his trial counsel's performance was deficient or that the allegedly deficient performance prejudiced him in any way.

Defendant first argues that his trial counsel should have conducted an investigation into the background of Abbas Aldirani, an important witness who testified for the government. Defendant contends that such an investigation would have revealed that Aldirani is "a dishonest informant who had a history of setting up others for his own personal gain." Defendant's § 2255 Motion, p. 10. Defendant also asserts that he has hired a private investigator, who has learned "that federal agents in Detroit had a reputation within the law enforcement community for shielding Abbas Aldirani from criminal prosecution and allowing Aldirani to use his

DEA informant status to further his own continuing criminal drug enterprise." *Id.* at 11. Defendant argues that if his trial attorney had conducted such an investigation, defendant may have been able to cast additional doubt on Aldirani's credibility.

Defendant has not met his burden under *Strickland.* Defendant does not deny that his trial counsel challenged Aldirani's credibility through extensive cross-examination. Trial counsel's cross-examination of Aldirani took place over a two-day period and takes up over 260 pages of the trial transcript. See Response of the United States, p. 4 n. 1. The mere fact that a background investigation may have given trial counsel additional material with which to further impeach Aldirani does not show that trial counsel's performance was "manifestly ineffective." As the Sixth Circuit noted in deciding the direct appeal, "[e]ssentially, Defendant is attempting to re-try the credibility of the trial witnesses, which the jury has already assessed in convicting him." *United States v. Hourani*, 1999 WL 16472, at *1.

Additionally, the court notes that much of the information gathered by defendant's private investigator is not the type of evidence that could have been used at trial, even if trial counsel had discovered it in the course of the background investigation defendant faults him for not having conducted. The investigator, Joel Woods, avers that he "used to be a law enforcement officer who actually participated in the execution of a search warrant at Dani Hourani's home in the early 1990s." Declaration of Joel M. Woods, ¶ 2. Woods says that he has spoken with "several law enforcement agents under assurances of honoring their anonymity." *Id.* ¶ 3.

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Through his own experience, and from conversations with these anonymous law enforcement sources, Woods says he has learned that Aldirani "was considered to be one of the most valuable informants among DEA and other narcotics agents in the metropolitan Detroit area in the early 1990's"; that "some agents would ignore illegal activities of informants who were producing results in arrests and seizures"; that Aldirani "was known to play one agent off against another, and many DEA agents knew that Aldirani was still a major drug dealer while working as a DEA informant"; that "[i]t was believed that many of the people he turned in were rival drug dealers"; that "[t]he DEA reportedly kept using Aidirani even after he failed several lie detector tests about his activities"; that "it reportedly became common for some federal agents to take Aldirani's word at face value with little further investigation"; and that "[o]ne source indicated that some agents still believe that Aldirani ordered the attack on FBI informant Hassan Cheaib in December 1992." *Id.* ¶¶ 3, 4.

Woods gathered additional hearsay upon hearsay from other anonymous sources as well. "Another part of this investigation was to make contact with 'street sources' in the area of West Warren Road in Dearborn, which is the neighborhood where Aldirani engaged in many of his previous activities." *Id.* ¶ 5. Woods states that these unnamed "street sources" told him that "Aldirani is said to have almost folk-hero status among drug dealers in this local ethnic Lebanese community"; that "Aldirani is thought to be a member of the 'kallsou' family, which is known in the local crime community as responsible for several killings over the past few years"; that "Aldirani is generally considered by

street informants as an enforcer and a man to be feared"; that Aldirani "is reportedly not being deported to his native Lebanon despite multiple felony convictions for drug trafficking, and he is rumored to have been working again as an informant." *Id.* ¶¶ 5, 6. For good measure, Mr. Woods offers his own opinion that "[i]t would appear that Abbas Aldirani's reputation as a dishonest informant is consistent with Dani *Hourani*'s claim that Aldirani ordered the attack on Hassan Cheaib in 1992 and then escaped liability, and obtained leniency, by later blaming Dani Hourani for ordering the attack." *Id.* ¶ 7.

The "information" gathered by Mr. Woods, and which allegedly should have been gathered by defendant's trial counsel, is completely useless from an evidentiary standpoint. There is no conceivable way that any of this information, which consists of multiple hearsay and rumors from anonymous sources, could have been used at trial for any purpose, including impeachment of Aldirani. A trial attorney does not render ineffective assistance by declining to conduct an investigation which yields useless information such as this.

Defendant's second argument is even less persuasive than the first. Here defendant argues that his trial attorney was ineffective because he failed to object to the jury selection procedure used by this court at the time. That procedure, which sought to increase the representation of African Americans in the qualified jury wheel by randomly removing from the wheel one in five non-African Americans, was later found by the court of appeals to violate the Jury Selection

and Service Act, 28 U.S.C. § 1861, and the Equal Protection Clause of the Fourteenth Amendment. *See United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

Defendant asserts that he

> told his trial attorney, Mr. Fishman, about his knowledge of prejudices that often occurred between African-Americans and Arab Americans in the Detroit area, and his concern about how such prejudices in African-American jurors might affect the fairness of both the grand jury and the jury for his trial. Mr. Hourani asked Mr. Fishman to investigate and possibly challenge the local jury selection system.

Defendant's Supplemental Reply Mem., p. 2. It is apparent that defendant's only concern with the "fairness" of the jury selection procedure was that African Americans should be kept off the grand and petit juries because of alleged "prejudices that often occurred between African-Americans and Arab-Americans." This is not a legitimate grounds for challenging the procedure by which the grand and petit juries were selected. If a particular juror harbors any prejudice or bias for or against a particular racial group, this can and should be ferreted out during voir dire. And, indeed, Mr. Fishman indicates in an affidavit submitted by defendant that he used peremptory challenges to excuse all of the African American jurors from the panel during the selection of the petit jury.

Under these circumstances, defendant has failed to show any prejudice from his attorney's failure to challenge the jury selection procedure. Defendant says he was concerned that African American jurors might be prejudiced against him because he is an Arab American. The court will not comment on the legitimacy of these "concerns" or of Mr. Fishman's use of peremptory challenges at trial. In any event, it is clear that no such prejudice could have been present because no African Americans served on the petit jury. *See United States v. Carr*, 1999 WL 211928, at *6 (6th Cir. Mar. 11, 1999) (dismissing a claim of ineffective assistance of counsel because "absolutely no evidence in the record" showed that defendant was prejudiced by his attorney's failure to challenge the jury selection procedure).

Defendant's final ineffective assistance argument is that his trial attorney failed to have an audio-taped conversation between defendant and Aldirani transcribed and translated for use at trial to impeach Aldirani. The conversation occurred on September 28, 1993, at the Macomb County Jail. Aldirani was working as an FBI informant at the time and was wearing a recording device. Defendant has had the audio tape transcribed and translated and has filed the transcript in support of his § 2255 motion. Defendant asserts that "the recording contradicts Aldirani's testimony, and counsel was negligent for failing to have the recording translated and transcribed." Defendant's § 2255 Motion, p. 15.

The court spent over two hours reading the 70-page transcript submitted by defendant and could find nothing that might have assisted defendant at trial. Defendant claims that the tape could have been used to impeach Aldirani. Yet there

is nothing in the tape that appears to impeach Aldirani. Even if anything in the tape could be considered to be impeaching, it cannot be said that Mr. Fishman rendered ineffective assistance of counsel by failing to obtain every conceivable scrap of potentially impeaching evidence. As noted above, Mr. Fishman cross-examined Aldirani extensively, and there is nothing to indicate that the taped conversation would have added anything to assist defendant.

Finally, defendant argues that the government withheld exculpatory evidence and allowed Aldirani to commit perjury at trial. This argument is based on the contentions that (1) Aldirani testified at trial that he expected to be deported, yet Mr. Woods says Aldirani "has reportedly been seen in the Detroit area" and "is rumored to be working as an informant again"; (2) Mr. Woods has interviewed Aldirani's girlfriend, who told him that Aldirani told her that "he may want to recant some of his trial testimony"; and (3) "recent investigative contacts made with sources in the Detroit law enforcement community has revealed [sic] that several federal agents in the [DEA], [FBI], and/or the U.S. Attorney's office in Detroit, likely possessed information that would have proved Abbas Aldirani committed repeated perjury at trial . . . ." Defendant's § 2255 Motion, pp. 16-17. The latter allegation apparently is based on the same "information" gathered by Mr. Woods from his unnamed law enforcement sources, as summarized above.

Certainly, the defendant is entitled in every criminal case to the disclosure of exculpatory evidence, and to not have the government introduce testimony it knows to be untruthful. In the present case, however, defendant has not demonstrated

that the government either withheld exculpatory evidence or that Aldirani testified untruthfully. There is no merit to this claim whatsoever. As with defendant's claim that his trial attorney failed to investigate Aldirani's background, the present claim is based on the compound hearsay and rumor "information" gathered by defendant's investigator. This multiple hearsay and rumor does not support the alleged violation of defendant's right to a fair trial.

Given the complete lack of merit to any of defendant's arguments, the court is not inclined to permit defendant to engage in any discovery. Accordingly,

IT IS ORDERED that defendant's § 2255 motion is denied.

IT IS FURTHER ORDERED that defendant's motion for leave to initiate discovery is denied.

s/ Bernard A. Friedman
BERNARD A. FRIEDMAN

Dated: AUG 08 2001
Detroit, Michigan

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC DATED AND FILED APRIL 25, 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

01-2433

DANI HOURANI,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: NORRIS, SILER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix D

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V (the "Due Process Clause"):

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Title 28 U.S.C. § 2253(c):

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> . . .
>
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX F — AFFIDAVIT OF STEVEN FISHMAN DATED SEPTEMBER 5, 2001

AFFIDAVIT OF STEVEN FISHMAN

STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

STEVEN FISHMAN, being first duly sworn, deposes and says as follows:

1. I represented Dani Hourani in #95-CR-80071 before this Court.

2. On or about June 1, 1999, I submitted an affidavit to the Court concerning certain issues in the case.

3. All of the statements contained in the affidavit were true and correct.

4. I have reviewed the recent opinion of the Court denying Mr. Hourani's motion for new trial.

5. The purpose of this affidavit is to clarify the issue of my failure to file an *Ovalle*-type motion concerning the manner of selection of grand and petit juries utilized by the Eastern District of Michigan at the time of Mr. Hourani's indictment and trial.

6. In preparing this affidavit, I have had the opportunity to review a transcript of the September 28, 1993 tape-recorded conversation between Mr. Hourani and Abbas

Aldirani at the Macomb County Jail. That transcript supports my recollection of conversations between myself and Mr. Hourani concerning the *Ovalle* issue.

7. During one of my first conversations with Mr. Hourani in the Wayne County Jail, he asked me to file an *Ovalle*-type motion to inspect the list of jurors from which the grand jury and/or trial jury was selected. I made a note on a yellow pad at the time of the jail interview, a copy of which was attached to my original affidavit. Further support for the fact that Mr. Hourani made such a request is found at page 17 of the transcript of the Hourani-Aldirani jail conversation where Mr. Hourani tells Mr. Aldirani, "There's a motion I told my lawyer to file. It's called a master list for the jury, for the Grand Jury. I'm telling you this guy upstairs, he got life. They did not grant him that motion and they reversed his thing and told him they were gonna set him free, if they would have granted that motion . . ."

8. Despite his request, I did not file a motion to inspect the jury lists nor did I challenge the jury selection process, nor did I conduct any research into whether the jury selection process in the Eastern District of Michigan was constitutional.

9. The basis for Mr. Hourani's request that an *Ovalle*-type motion by filed, in addition to the information he had received concerning another inmate's case, was his fear that Arab-Americans were being discriminated against in the jury selection process. He believed, and continued to insist, that he had not been indicted by a properly constituted grand jury. Nevertheless, because I was unfamiliar with the selection

process being utilized at the time and unaware that any legal challenges had been filed to said process, I did not file the requested motion.

10. Though Mr. Hourani urged me to file an *Ovalle*-type motion prior to trial, his insistence as to that issue appeared to be motivated primarily by the fact that (a) the system had been challenged by another inmate as evidenced by his conversation with Aldirani in the jail; and (b) his concern that Arab-Americans were being excluded by the system. That concern was heightened when I informed him that, in my opinion, Detroit-area blacks would not be favorable jurors in his case because of what I believed to be the prejudice of Detroit-area blacks against Arab-Americans.

11. During jury selection, I used peremptory challenges to remove every potential black juror from the jury. I did so because I was firmly convinced that Detroit-area blacks were prejudiced against Arab-Americans because of the ethnic tensions that existed as a result of contact between the two groups at Arab-American party stores and gas stations located in black neighborhoods. Mr. Hourani had nothing to do with my exercise of these peremptory challenges and, in fact, despite my expressed opinion on the subject, initially wanted to keep black jurors because he believed that they were fairer and more liberal than white jurors.

12. My failure to file an *Ovalle*-type motion or to otherwise challenge the jury selection process in the Eastern District of Michigan was not part of any trial strategy. Quite frankly, I believed Mr. Hourani's request to be nothing more than "jail talk" and failed to investigate it any further. I deeply

regret having failed to file such a motion; had I done otherwise, Mr. Hourani would quite possibly be entitled to a new trial on a case where the evidence left much to be desired.

FURTHER DEPONENT SAYETH NOT.

s/ Steven Fishman
STEVEN FISHMAN